STATE OF MICHIGAN

DEPARTMENT OF CONSUMER & INDUSTRY SERVICES

OFFICE OF FINANCIAL AND INSURANCE SERVICES

Before the Commissioner

In the matter of the Ambulatory Surgical Facilities
Provider Class Plan Modification Determination
Report Pursuant to P.A. 350 of 1980
_____/ No. 02-003-BC

Issued and entered
This 31st day of January, 2002
By Frank M. Fitzgerald

ORDER APPROVING BLUE CROSS BLUE SHIELD OF MICHIGAN MODIFICATION TO THE AMBULATORY SURGICAL FACILITIES PROVIDER CLASS PLAN

BACKGROUND

On July 6, 1999, the Commissioner of Insurance issued Order No. 99-117-BC, giving notice to Blue Cross Blue Shield of Michigan (BCBSM), and to each person having requested a copy of such notice, of his intent to make a determination with respect to the ambulatory surgical facilities (ASF) provider class plan for calendar years 1996 and 1997. After analyzing all available information, including the input obtained in accordance with MCL 550.1505(2), the Commissioner's determination with respect to his review of the ASF provider class plan in effect during calendar years 1996 and 1997 was set forth in Order No. 00-007-BC dated March 30, 2000.

In his order of March 30, 2000, the Commissioner found that BCBSM's ASF provider class plan did not substantially achieve the access and quality of care goals as provided in MCL 550.1504. Inasmuch as BCBSM failed to demonstrate that its failure to meet either of these goals was reasonable, the determination report was issued pursuant to MCL 550.1510(1)(c). This finding required BCBSM to transmit, in accordance with MCL 550.511(1), a remedial ASF provider class plan that substantially achieves the goals, achieves the objectives and substantially overcomes the deficiencies enumerated in the determination report within a six month period. BCBSM requested an extension of 90 days to file a remedial plan, as provided by MCL 550.1512, to allow time to conduct two large advisory meetings and to circulate draft revisions to participants. The

Commissioner considered BCBSM's request for the 90-day extension to file the remedial plan and granted BCBSM an extension through December 29, 2000.

The Office of Financial and Insurance Services (OFIS) received BCBSM's remedial plan on December 29, 2000. On January 3, 2001, OFIS sent all interested parties of record a copy of the remedial ASF provider class plan, requesting that written advice and consultation with respect to the remedial plan be filed with OFIS by January 31, 2001.

After an extensive review of BCBSM's remedial ASF provider class plan conducted pursuant to MCL 550.1513(1), the Commissioner found that the remedial ASF provider class plan filed by BCBSM on December 29, 2000 substantially achieved the goals, achieved the objectives and substantially overcame the deficiencies enumerated in the findings made by the Commissioner in the March 30, 2000 determination report. As such, BCBSM's remedial ASF provider class plan was retained and placed into effect in accordance with MCL 550.1506.

On December 17, 2001, BCBSM filed modifications to the ASF provider class plan with the Commissioner for approval. BCBSM is proposing two substantive modifications. The first modification to the plan would provide for an extension of the Evidence of Need (EON) transition period. In essence, this modification would grant a six-month extension of time to meet BCBSM's EON standard to all currently participating ASFs that do not meet BCBSM's EON standard but meet all of its other qualification standards. During the extended EON transition period, nonparticipating ASFs would be allowed to qualify for participation based on their most recent six months volumes. The second modification to the plan would change the recertification period from once every year to once every other year. Under the recertification process, all providers must demonstrate that they meet BCBSM's participation requirements in order to continue participating with BCBSM.

DISCUSSION

MCL 550.1508(1)(a) and (b) provides that BCBSM may modify a provider class plan under the following circumstances: "(a) If the plan was prepared by the health care corporation and is not a plan prepared pursuant to section 511(1) or 515(4). However, the modification shall not take effect until after the modification has been filed with the commissioner; (b) in all other cases, if the modification has been filed with and is agreed to by the commissioner."

Since the plan that BCBSM is proposing to modify was not prepared pursuant to Section 511(1) or 515(4), then the modification that BCBSM is proposing falls under Section 508(1)(b) and must therefore be agreed to by the Commissioner before it can become effective.

Pursuant to MCL 550.1508(2), "In developing plan modifications, a health care corporation shall obtain advice and consultation from providers in the relevant provider class and from subscribers pursuant to section 505. Before agreeing to plan modifications under subsection (1)(b), the commissioner shall obtain advice and consultation pursuant to section 505(2)." Advice and consultation was sought by OFIS through a posting of the proposed modifications on the OFIS website. Written notice seeking advice and consultation was also sought from all persons who had previously expressed an interest in BCBSM's ASF provider class plans. Written input was accepted from January 7 through January 23, 2002.

Although no subscribers responded, input was received from providers by BCBSM pursuant to an October 29, 2001 provider input meeting hosted by BCBSM. This input was summarized by BCBSM, and the summary was provided to OFIS. Copies of written comments received by BCBSM were also provided to OFIS. The following is a summary of all the comments received by OFIS:

Summary of Comments from Providers Attending BCBSM Meeting

Thirty individuals representing 11 hospitals and 11 physician-owned facilities attended BCBSM's provider input meeting held on October 29, 2001. BCBSM summarized the outcome of the meeting stating that the majority of the providers attending the meeting supported the amendments, as they would help increase network stability. However, they also said that the amendments do not go far enough. They felt the amendments should better address the definition of rural versus urban; allow providers with multiple facilities to combine volumes; and extend the transition period for 2 years (rather than six months).

Some providers stated that they were generally opposed to any sort of evidence of need volume or operating room requirements. One provider indicated that the only fair long-term solution is to lower the volume and operating room requirements "across the board". Two providers (one hospital and one not-hospital) stated that they did not support the amendments because they felt that they would result in further grandfathering of existing facilities that do not meet current standards.

Written Comments Received by BCBSM

Three letters from non-hospital facilities are nearly identical. These letters state that BCBSM's proposed change to the EON perpetuates BCBSM discrimination against independently owned ASFs in violation of 550.1502. They believe that the plan approved by OFIS should be enforced exactly as written, and they do not support modifications to the plan unless the EON is completely eliminated for all ASFs. In addition, the re-certification program is completely inconsistent with BCBSM's prior stated position that promoted the idea that ASF size and volume was somehow a "quality and safety" issue. One other non-hospital ASF wrote specifically about the re-certification program. That ASF still contends that BCBSM's re-certification program has no scientific, measurable link. If the re-certification program based in volume is such an important measure of safety and quality, why is BCBSM proposing to change it?

Two other letters were from other non-hospital ASFs. The sentiments include the same above discussion and go on to speak about how the whole process is a political one rather than one based on logic or scientific data. They believe that it would be more reasonable to adjust the EON to 800 cases (the average number of ASF cases per surgical room in 1999) and eliminate the minimum room requirement. Doing this would eliminate the need for any rural adjustment. They believe that this change would result in at least 34 ASFs qualifying for participation, bringing the par rate to between 50-70%.

The last letter was from a hospital-owned ASF. This ASF supports the amendments but does not believe that the amendments go far enough. There is no rational connection to cost, quality or access for a hospital-based ASF to have to close surgery rooms when it performs 3,600 procedures and has three or more operating rooms. Second, decertifying hospital based ASFs will disrupt patient care. Also those to be terminated are multi-specialty when the new facilities accepted are mostly single specialty. Third, while a numerical measure is a good proxy for quality for some services like transplants or open-heart surgery, it is not a credible indicator for low risk ambulatory care services performed in an ASF. Accreditation and affiliation with licensed and accredited hospitals are far better indicators. Requirements such as integrated medical staff, common medical record, common grievance, administration, clinical oversight and financial integration are used to evidence a level of integration to assure quality. These are the things that Medicare and other insurers require. Lastly, payment for services are set by billing code no matter whether done in a hospital based or freestanding ASF. Currently there is a shortage of multi-specialty ambulatory services. The growth of hospital affiliated multi-specialty ambulatory surgery capacity reduces overall costs. Loss of such capacity increases cost. Most

importantly, having to close operating rooms in operating ASFs results "in a significant waste of fully paid capital resources".

Comments Received by OFIS

The physician owner of one ASF claims that the modifications are an attempt to circumvent the appeal process. The access goal wasn't met in the original plan, the remedial plan still won't meet the access goal if the modifications are approved.

One person wrote on behalf of three non-hospital ASFs that were granted approval to participate after acceptance of the remedial plan. These three ASFs believe that the modifications are fair and resolve the concerns regarding physician pattern changes.

The physician owner of yet another ASF indicates that the merits of the CON (certificate of need) legislation are currently being reviewed in the legislature. He claims that the Federal Trade Commission has gone on record in opposition to the standards on which the EON is based. As far as access, participation rates did not increase because of the restrictive EON standards. The remedial plan is fundamentally flawed. As far as quality, there is no scientific evidence that the number of rooms or procedures is linked to the quality of patient outcomes. He claims that there are currently six hospital ASFs that don't meet the minimum number of rooms and 4 hospital ASFs that don't meet the volumes, yet they are considered facilities with high enough quality for BCBSM to participate with them right now. As far as the transition period and re-certification periods – either the EON requirements and re-certification period are quality standards or they are not. There are a number of non-hospital based ASFs that reclassified themselves from multi-specialty to single specialty; one ASF delicensed an operating room that cost $1 million to build and license. Another ASF is investing $3 million in an expansion plan. Overall, this provider estimates that non-hospital ASFs have made $10 million in financial sacrifices while hospital ASFs have sacrificed nothing. In his opinion, no hospital based ASFs have made attempts to change anything. Lastly, this provider speaks about inequity. If hospitals had to meet the same BCBSM EON criteria, 93% would not meet the criteria. He noted that the Michigan Department of Community Health classifies all operating rooms (hospital and ASF) the same.

A representative of two other physician-owned ASF reiterated these same comments. The first person also added that the only modifications that should be allowed are to eliminate or modify the EON requirement. It should be noted that this ASF meets the BCBSM participation requirements but chooses not to participate with BCBSM. The second person added his claim that BCBSM's

modification is just a "band-aid" solution of continuing to participate with non-qualifying hospital facilities to increase the participation rates. It states it would be better to use the average 1999 volume data of 800 cases per room in setting the EON. That would still leave par rates at less than 70%.

A hospital-based ASF supports the transition period, but continues to be concerned about the overall ASF plan. This provider fails to see how reducing its operating rooms from to 6 to 4 at one ASF and from 5 to 3 at another site will reduce cost, improve quality or improve access. This provider wants another amendment to "preserve patient access to existing ambulatory surgery facilities so long as the facility has at least 3 operating rooms and the 3,600 procedure threshold is met" (in order to participate).

Another physician-owned ASF now participating with BCBSM notes that OFIS continues to let BCBSM do whatever it wants; this person believes there is no evidence that the EON promotes quality of care. Public input is 'like shouting down an empty well and the only sounds we hear in return are our voices echoing back at us." This person believes the EON process is illegal and that modification of an illegal provision is still illegal.

Lastly, a physician from another hospital not affiliated with any ASF states he believes that the remedial plan should remain intact and the modifications rejected because it has only been 9 months since the modified plan was put into effect. He asks OFIS to remember the major objective of PA 350 when looking at the modifications was to ensure the delivery of high-quality health care services while controlling costs. A well-defined EON transition period (which the remedial plan already had) was to have leveled the playing field. Extending the transition period will likely further increase the number of participating facilities and thus increase costs. In this time of budgetary shortfalls, increases in cost should not be allowed to continue. OFIS should deny BCBSM's modifications. Further, the re-certification period change should not be allowed either. If surgical volume is directly related to the health care quality as OFIS claims, and if quality is a major PA 350 goal, then annual re-certification is a necessity, not an option.

ANALYSIS

MCL 550.1504(1) requires a health care corporation to "contract with or enter into a reimbursement arrangement to assure subscribers reasonable access to and reasonable cost and quality of health care services". One of the goals that must be met under the reimbursement arrangement is to ensure "an appropriate number of providers throughout this state to assure the availability of certificate-covered health care services to each subscriber".

In the Commissioner's order determining the goal achievement of BCBSM's remedial ASF provider class plan dated March 29, 2001, it was noted that in the first year of BCBSM's remedial plan, the estimated participation rate was to have increased from 36% to 45%. According to recent statistics provided by BCBSM, the current participation rate is 53%. If the Commissioner does not agree to BCBSM's proposed modifications to the ASF class plan, access will deteriorate for BCBSM members by 10 facilities, and the participation rate will be reduced to only 37% -- only 1% higher than the participation rate before the remedial plan was placed into effect. Even if the Commissioner agrees to BCBSM's proposed modifications, the participation rate will still be reduced from the current 53% to 47% (see attached document to this order).

Further, the Commissioner is concerned over the quality and continuity of care provided to BCBSM's members. If BCBSM were forced to abruptly departicipate with these 10 ASFs, any BCBSM member who might have had a surgical procedure already scheduled would have to cancel that procedure, locate another facility that could perform the surgery, and be forced to wait an additional period before the medically-necessary service could be performed. Regardless of the differences in opinion among the provider community regarding BCBSM participation requirements for ASFs, this seems patently unfair to BCBSM's members needing medical services.

Therefore, the Commissioner concludes it is in the best interest of BCBSM's members to approve the proposed modifications because the modifications will improve continuity of care and access to care for certificate-covered services.

ORDER

Therefore, it is ordered that:

1. The modifications proposed by BCBSM to the ambulatory surgical facility provider class plan are hereby agreed to by the Commissioner, as provided under MCL 550.1508(1)(b).

2. BCBSM is hereby given notice that if it does not file a new or modified provider class plan by April 1, 2003, that includes a revised method for determining eligibility for participation which ensures an adequate, stable ASF network of providers, the Commissioner will commence a review of this plan pursuant to the provisions of MCL 550.1509.

3. BCBSM and each person who has requested a copy of the Commissioner's determination in this matter shall be provided with a copy by certified or registered mail.

4. An appeal of this order may be filed pursuant to MCL 600.631, MCR 7.104 and MCR 7.101 within 21 days after the date of this order.

The Commissioner retains jurisdiction of the matters contained herein and the authority to enter such further order or orders as he shall deem just, necessary and appropriate.

Provider Class Region	Total Providers*	Currently Participating Providers	Current Par Rate	Par Providers After Approval	Projected Par Rate	Par Providers After Transition Period	Projected Par Rate	Par Providers Without Approval	Projected Par Rate
1	35	17	49%	14	40%	13	37%	9	26%
2	1	0	0%	0	0%	0	0%	0	0%
3	4	2	50%	2	50%	2	50%	2	50%
4	3	1	33%	1	33%	1	33%	1	33%
5	7	6	86%	5	71%	5	71%	5	71%
6	6	4	67%	4	67%	4	67%	4	67%
7	2	2	100%	2	100%	2	100%	1	50%
8	1	1	100%	1	100%	1	100%	1	100%
9	3	0	0%	0	0%	0	0%	0	0%
	62	33	53%	29	47%	28	45%	23	37%
Hosp/Non Hosp		23/10		19/10		18/10		13/10	

* Excludes providers of non-covered services (e.g., Planned Parenthood, plastic surgery)

Includes Health Care Midwest (region 5) - BCBSM doesn't intend to terminate on 2/1/02 as it has received CON approval to build 2 more ORs. ORs are not built yet but BCBSM anticipates the ORs will be built by end of transition period

3 hospitals in region one and 1 hospital in region 5 will not meet OR requirements and will be terminated 2/01/02

The only regions affected by modification approval are regions 1 and 7